



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD

CHICAGO, IL 60604-3590

962444

REPLY TO THE ATTENTION OF:

C-14J

February 25, 2010

Joseph D. Lonardo
Vorys, Sater, Seymour and Pease LLP
1909 K Street NW
Suite 900
Washington, D.C. 20006-1152

RE: Trinity Superfund Site (Cleveland, Ohio)
Oversight Bill dated October 8, 2009
Dispute Resolution – U.S. EPA Statement of Position

Dear Mr. Lonardo:

The United States Environmental Protection Agency ("U.S. EPA" or "Agency") has received your letter on behalf of the Standex International Corporation ("Standex") dated February 4, 2010. The Agency appreciates that Standex wishes to resolve this matter in a manner which is agreeable to both U.S. EPA and Standex. This letter serves as both the Statement of Position of U.S. EPA pursuant to the dispute resolution procedures outlined in paragraph 40 of the June 2008 Administrative Settlement Agreement and Order on Consent for Removal Action ("AOC"), and as a basis for settlement discussions between U.S. EPA and Standex.

As you know, the history of this dispute is as follows:

- 10/8/09: U.S. EPA issues an oversight bill containing an Itemized Cost Summary to Standex pursuant to Section XV of the AOC for \$312,599.22 (covering the period June 5, 2008 to June 4, 2009)
- 10/13/09: Standex receives the oversight bill
- 11/2/09: Standex requests an extension to the due date for payment of the 10/8/09 bill and requests additional cost documentation
- 11/2/09: U.S. EPA declines the request for extension
- 11/12/09: Standex invokes dispute resolution pursuant to Section XVI of the AOC, agrees to escrow the amount of the bill, and again requests additional cost documentation

- 11/19/09: U.S. EPA agrees to provide additional cost documentation to Standex, and to extend the time for Standex's submittal of its written documentation of its objection until thirty (30) days after Standex receives the additional documentation. U.S. EPA also indicates that some or all of the interest on the escrowed amount may be waived once the dispute is resolved.
- 12/29/09: U.S. EPA sends additional cost documentation to Standex
- 1/5/10: Standex receives the additional cost documentation sent by U.S. EPA
- 2/4/10: Standex submits its written documentation of its objection
- 2/12/10: U.S. EPA extends due date for its Statement of Position until 2/26/10

U.S. EPA notes as an initial matter that Standex is required under paragraph 40 of the AOC to notify U.S. EPA within ten (10) calendar days of its objections to the oversight bill. Since Standex received the bill on October 13, 2009, the objections were due on October 23, 2009, – however Standex did not invoke dispute resolution until November 12, 2009. Therefore the Standex objections were arguably several weeks late.¹

Assuming this procedural error is not fatal to Standex, U.S. EPA also believes that the dispute should be resolved on behalf of the Agency for several other reasons, discussed below.

First, the AOC only requires that U.S. EPA provide an Itemized Cost Summary with oversight bills (see AOC at paragraph 36.a). The October 8, 2009, bill was sent with an Itemized Cost Summary. The Standex criticism that the “itemized bill provides not [sic] basis on which to pay or object to the itemized bill” is irrelevant at this time. The time to discuss the amount of documentation required to support an oversight bill was during the AOC negotiations. While U.S. EPA did provide additional cost documentation in an effort to resolve the dispute, the sufficiency of that cost documentation should have no bearing on the resolution of this dispute.

Second, disputes regarding oversight bills can only be raised for two reasons:

Respondent may dispute all or part of a bill for Future Response Costs submitted under this Settlement Agreement, only if Respondent alleges that U.S. EPA has made an accounting error, or if Respondent alleges that a cost item is inconsistent with the NCP.
AOC at paragraph 38.

In this instance, Standex does not specifically allege either of the allowable bases in its challenge.

Third, Standex raises a number of issues in its February 4, 2010, objections, but these issues are irrelevant given the language of the AOC and/or are easily explained:

¹ U.S. EPA does acknowledge that in its November 19, 2009, letter, the Agency extended the time for Standex's submittal of its objection until thirty (30) days after Standex received additional documentation.

- U.S. EPA did not provide daily timesheets for Weston employees

As noted above, the AOC only requires U.S. EPA to provide an Itemized Cost Summary (ICS) with its oversight bills – therefore additional cost documentation was not required to be provided to Standex by the Agency. Essentially, Standex agreed up front that the U.S. EPA ICS system, which does not include timesheets for contract employees, is sufficient information. Nonetheless, in anticipation of resolving this matter quickly, U.S. EPA did provide additional cost documentation in the form of Monthly Progress Reports. While the Monthly Progress Reports do not include individual timesheets for each contractor employee who worked on oversight for U.S. EPA, they do include the names, titles and hours charged each month for each contractor employee who worked on oversight for U.S. EPA. Combining this information with the description of “Progress Made This Reporting Period” allows Standex to clearly understand what work was accomplished by these employees.

- U.S. EPA did not provide daily timesheets for U.S. EPA employees

Again, as noted above, the AOC only requires U.S. EPA to provide an Itemized Cost Summary (ICS) with its oversight bills – therefore additional cost documentation was not required to be provided to Standex by the Agency. Essentially, Standex agreed up front that the U.S. EPA ICS system, which does not include timesheets for U.S. EPA employees, is sufficient information. Furthermore, Standex only requested additional documentation regarding Weston employees, not U.S. EPA employees. Finally, it should be noted that the ICS does include the names, titles and hours charged each month for each U.S. EPA employee who worked on oversight for U.S. EPA.

- Field activities started July 14, 2009, but U.S. EPA includes earlier charges

U.S. EPA acknowledges that the oversight bill includes charges dated prior to the date field activities commenced. However, “Work” defined under the AOC is not just field activities – there are many “Work” activities which occur both prior to and after field activities. For example: U.S. EPA review and approval of the draft First Work Plan (AOC paragraph 15.a); U.S. EPA review and approval of the draft Second Work Plan (AOC paragraph 15.b); U.S. EPA review and comment on the Health and Safety Plan (AOC paragraph 16); U.S. EPA review and approval of Post-Removal Site Control (AOC paragraph 18), and; U.S. EPA review and approval of the Final Report (AOC paragraph 20).

- More than one Monthly Progress Report was issued for the same month

U.S. EPA did not enter into a contract with Weston for oversight of the Work in the Trinity AOC. Rather, U.S. EPA Region 5 has a large contract with Weston which establishes twelve Task Orders that generally describe work to be done for Region 5 in broad terms. One of these Task Orders encompasses removal work. During contract performance, work is ordered under the removal Task Order using Technical Direction Documents (“TDDs”). These TDDs specifically describe the work to be done. The

TDDs which were used to accomplish the oversight work billed on October 8, 2009, are as follows²:

- PRP Removal Oversight (#S05-0001-0807-004)
- PRP Removal Oversight-Analytical (#S05-0001-0807-007)
- Site Assessment (#S05-0002-0705-006)
- Fund-Lead Removal (#S05-0003-0711-014)
- Fund-Lead Removal-Analytical (#S05-0003-0711-015)

Each TDD requires its own Monthly Progress Report. Therefore, more than one Monthly Progress Report was issued for a single month.

- Field activities ended January 23, 2009, but U.S. EPA includes later charges

U.S. EPA acknowledges that the oversight bill includes charges dated subsequent to the date field activities commenced. However, “Work” defined under the AOC is not just field activities – there are many “Work” activities which occur both prior to and after field activities, as described above.

- The bill includes “cumulative, excessive, random hours” for U.S. EPA employees

U.S. EPA vigorously defends the U.S. EPA employee hours billed on October 8, 2009. When billing time, each employee must attest that the hours billed are accurate. As an added safeguard, prior to mailing the October 8, 2009, bill, the case team also consulted persons listed on the ICS and asked them to confirm that the hours billed were in fact accurate and correct. Although some employees sporadically billed to the Trinity Site, that does not make the hours billed questionable. For example: attorney Sherry Estes was consulted when an institutional control was being discussed; attorney Peter Felitti and financial specialists Sheila Barnes and Darius Taylor assisted in compiling the October 8, 2009, bill; investigator Joseph Malek and environmental protection specialist Valerie Mullins assisted in gathering liability evidence related to the Site, and; attorneys Robert Kaplan, Leverett Nelson, Debra Klassman and Lawrence Kyte supervised staff attorneys Catherine Garypie and Harriet Croke on the case.

In closing, the dispute should be resolved on behalf of the Agency. U.S. EPA issued a bill with an accompanying Itemized Cost Summary, consistent with paragraph 36.a of the AOC. Standex was arguably late in invoking dispute resolution, but even assuming that tardiness is not an issue, Standex has not raised specific accounting errors or made allegations that one or more cost items are inconsistent with the NCP – the only bases for

² It should be noted that although some of the work was billed under Site Assessment (\$556), Fund-Lead Removal (\$4,980), or Fund-Lead Removal-Analytical (\$137), that work is properly considered oversight of the “Work” under the AOC. This is because: (1) Site Assessment activities include gathering information to determine the extent of contamination on site to define the areas of the site that need to be included in the entire cleanup, and (2) both Fund-Lead Removal and Fund-Lead Removal-Analytical activities included sampling and analysis at the Site which was used for to understand the scope of what Standex was required to perform under the AOC.

challenge under paragraph 38 of the AOC. Finally, the objections made by Standex can be easily overcome, as discussed above.

Pursuant to paragraph 40 of the AOC, the administrative record for this dispute will now be transmitted to the Director of the Superfund Division, U.S. EPA Region 5, for final resolution. The case team is open to discussing the resolution of this matter while the Director's decision is pending. If Standex wishes to engage in such discussions, please contact me immediately at (312) 886-5825.

Sincerely yours,

A handwritten signature in blue ink, appearing to read 'C. Garypie', with a long horizontal flourish extending to the right.

Catherine Garypie
Associate Regional Counsel

cc: Stacey S. Constan, Esq.
Standex International Corporation
6 Manor Parkway
Salem, New Hampshire 03079